

No. 86-6

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

JAMES G. RICKETTS, Director, Arizona Department of
Corrections, *et al.*,

Petitioners,

v.

JOHN HARVEY ADAMSON,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Does 28 U.S.C. § 2254(d) require a federal court, reviewing a habeas corpus petition, to defer to a state court determination that a defendant has waived his federal constitutional rights?

2. Did the Court of Appeals err in finding that, on the facts of this particular case, and under the appropriate federal standard, John Adamson did nothing which forfeited the protection of the Double Jeopardy Clause of the fifth amendment?

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STATEMENT OF THE CASE

This case comes to this Court for review of the Court of Appeals' reversal of a District Court's summary dismissal of John Harvey Adamson's Petition for a Writ of Habeas Corpus.

At no time, either in the District Court or in the state courts, has there been an evidentiary hearing regarding the facts and circumstances surrounding the central matter at issue here: the plea agreement between John Harvey Adamson and the State of Arizona, and Mr. Adamson's supposed violation of that agreement. However, the pleadings, arguments, and representations made by Mr. Adamson and his counsel throughout the course of the state and federal proceedings have outlined what occurred; and their contentions never have been seriously disputed by the State of Arizona.

Because the Court of Appeals' disposition of the issue here turned on a careful examination of these facts, and because the Petitioner's Brief glosses over them, we are constrained to set them out here again.

1. *The Crime.*

On June 2, 1976, *Arizona Republic* newspaper reporter Don Bolles was fatally injured by the explosion of a bomb attached to his automobile in a parking lot in Phoenix, Arizona. The bomb was attached to Mr. Bolles' car by John Harvey Adamson. It was detonated by a cohort of Mr. Adamson's, James Robison. *See State v. Dunlap*, 608 P.2d 41, 42 (Ariz. 1980). Mr. Adamson was hired to kill Mr. Bolles by a man named Max Dunlap, because Mr. Bolles had been "troublesome to Dunlap's friend and mentor, Kemper Marley." *Ibid.*

After he sustained his injuries, Mr. Bolles made statements indicating that he believed that Mr. Adamson was responsible for the bombing. *State v. Adamson*, 665 P.2d

972, 977 (Ariz. 1983). Based on those statements, and other evidence, Mr. Adamson was arrested and charged with Mr. Bolles' murder on June 13, 1976, the same day Mr. Bolles died. JA 164, 195. No other suspects were charged until January, 1977, when Mr. Adamson agreed to cooperate with the authorities in solving this, and three other crimes.

2. The Agreement.

The agreement between Mr. Adamson and the Arizona authorities was reached on January 15, 1977, as the jury was being impaneled for Mr. Adamson's trial. JA 1, 14. It was recorded in a document signed by Mr. Adamson, his attorneys, and representatives of the State.¹ The agreement provided that Mr. Adamson would plead guilty to the crime of second degree murder, and would receive a sentence of 48 to 49 years (with 20 years actual imprisonment), for the Bolles murder. JA 195. The State agreed not to prosecute Mr. Adamson for the crimes about which he would testify, and had given transcribed statements. JA 195, 197. Mr. Adamson agreed (1) to plead guilty to the charge of second degree murder, (2) to refrain from applying for parole for a period of 20 years and two months, (3) to testify truthfully against any and all parties involved in the murder of Don Bolles, the beating of a man named Leslie Boros, and two other crimes;² (4) to waive the time

¹ An abbreviated form of the agreement—lacking the caption, introductory paragraph, and signature lines—is set out as an appendix to the Court of Appeals' *en banc* opinion in this case. JA 195-199. Two exhibits incorporated into the agreement, which set out the specific cases in which Mr. Adamson had agreed to testify, were filed under seal along with the agreement itself. JA 196. They are not part of the present record.

² The two other crimes were specified in the exhibits filed with the agreement. They were the attempted bombing of the Bureau of Indian Affairs and the attempted arson of Ashford Plumbing Company, both of which occurred in Phoenix, Arizona. See JA 93, 118.

for sentencing until "the conclusion of his testimony in all the cases referred to in this agreement," (5) to refrain from appealing from the judgment and sentence; and (6) to abandon "any and all motions, defenses, objections, or requests that he has made or raised, or could assert hereafter, against the court's entry of judgment and imposition of sentence upon him consistent with this agreement." JA 195-199.

Pursuant to Arizona Rule of Criminal Procedure 17.4, the plea agreement was submitted to the judge then presiding over Mr. Adamson's prosecution, the Hon. Ben C. Birdsall. Judge Birdsall first reviewed the agreement with Mr. Adamson in open court, asking him if he understood each paragraph of the written document. JA 16-31. During this review of the plea agreement, Judge Birdsall advised Mr. Adamson, among other things, that sentencing "may occur at some date in the future when all your testimony in the various cases has been accomplished." JA 24. He also inquired in detail about each of the constitutional rights Mr. Adamson was giving up, by his guilty plea; Mr. Adamson said he understood these rights. JA 30-31.³ Finally, Judge Birdsall asked Mr. Adamson what he had done in connection with the Bolles murder, to establish the factual basis for the plea; Mr. Adamson responded, admitting his participation in the crime. JA 33-35. Judge Birdsall then took the matter under advisement, in order to make a determination as to whether the plea agreement and sentencing provisions were appropriate. JA 37-39.

³ Judge Birdsall advised Mr. Adamson that his guilty plea under the agreement resulted in waiver of the following constitutional rights: (1) speedy public trial, (2) confrontation and cross-examination, (3) presentation of evidence and witnesses, (4) representation and appointment of counsel, (5) freedom from self-incrimination, and (6) presumption of innocence. JA 30-31, 199. Double jeopardy was not included.

Four days later, court reconvened. Judge Birdsall indicated that he had reviewed the presentence report and "the plea agreement and all other matters which have been before this Court, and the matters contained in the file in this case . . . the transcript of the preliminary hearing," and made this finding:

[T]he Court finds that the provisions contained in the plea agreement regarding the sentence to be imposed upon the defendant are appropriate and the Court is not going to reject those provisions.

JA 43. Judge Birdsall then continued the sentencing date "subject to call." JA 43.

3. *Mr. Adamson's Performance Under the Agreement.*

Pursuant to the agreement, over the following two years, Mr. Adamson testified in a series of prosecutions.

During the period of time from January 19, 1977 to December 7, 1978, pursuant to the plea agreement, Petitioner testified a[t] trial in *State of Arizona v. Stan Tanner and James Robison* regarding the alleged beating of talent agent, Les Boros. During this period of time, Petitioner testified at the preliminary hearing and at trial in *State of Arizona v. Max Dunlap and James Robison* in connection with the alleged murder of Don Bolles. Further, during this same period of time, Petitioner testified at trial in *United States of America v. James Robison and Neil Roberts* in connection with the alleged attempted bombing of the Bureau of Indian Affairs Building in Phoenix. All of the defendants were convicted of the criminal offenses with which they were charged.

JA 118. There has never been a claim by the State of Arizona that Mr. Adamson's testimony was less than complete and truthful in any of these cases. In only one case covered by the plea agreement—the case involving the attempted arson of the Ashford Plumbing Company in

Phoenix—did Mr. Adamson not testify, because the case was never filed. Mr. Adamson cooperated fully in each case, and complied in every other respect with the terms of his plea agreement.⁴

4. *The Imposition of Sentence.*

In December, 1978, Assistant Attorney General William Schafer III contacted Mr. Adamson's counsel and Judge Birdsall's court, and asked that Mr. Adamson be sentenced under the plea agreement. JA 91, 142. Mr. Schafer later explained that the request was made because Mr. Adamson's testimony had placed him in danger from the others he had implicated, so the sentencing was "for Mr. Adamson's safety—to get Mr. Adamson into a form of confinement and custody that was better than the one he was currently in." JA 102. Mr. Adamson's attorneys were surprised by Mr. Schafer's request (JA 91), and questioned Mr. Schafer about the wisdom of imposing the sentence prior to the conclusion of the Dunlap and Robison appeals (JA 142), but did not object to having Mr. Adamson sentenced. JA 92.

On December 7, 1978, proceedings were reconvened in Judge Birdsall's court for the imposition of sentence. JA 46. Just before they went to court, Mr. Schafer and Mr. Adamson's attorneys—William Feldhacker and Gregory Martin—discussed the possibility that Mr. Adamson might still be called on to testify in the one case covered by the plea agreement that had not yet gone to trial, "the

⁴ In the trial of Max Dunlap and James Robison for the killing of Don Bolles, with the State's concurrence, Mr. Adamson invoked his Fifth Amendment privilege against defense cross-examination regarding several apparently collateral minor crimes as to which he had not been granted immunity. See JA 144; *State v. Dunlap, supra*, 608 P.2d at 42. The State has never claimed that this claim of privilege was a violation of the plea agreement.

attempted arson of the Ashford Plumbing Company in Phoenix." Affidavit, Exhibit 1 to Memo Supporting Petition, *Adamson v. Hill*, U.S. D.C. Ariz. No. 80-502 PHX CAM. Accordingly, before Judge Birdsall, Mr. Schafer stated on the record that "it has been discussed with counsel and I believe counsel has discussed with Mr. Adamson that it may be necessary in the future to bring Mr. Adamson back after sentencing for further testimony." JA 47-48. Mr. Feldhacker and Mr. Martin agreed. *Ibid.*⁵

The next day, Mr. Adamson was transferred to federal custody (JA 143), as the plea agreement had indicated would occur at "the conclusion of [Mr. Adamson's] . . . testimony in all of the cases in which [he] . . . agrees to testify as a result of this agreement." JA 199. While in federal custody, Mr. Adamson continued to provide information and testimony in a number of federal prosecutions over the ensuing year. JA 143-144.

5. *Mr. Adamson's Alleged Violation of the Agreement.*

On February 25, 1980, the convictions and death sentences imposed on Max Dunlap and James Robison for the killing of Don Bolles were reversed by the Arizona Supreme Court, because of limitations placed on the defendants' cross-examination of Mr. Adamson at their trial. *State v. Dunlap, supra*; *State v. Robison*, 608 P.2d 44 (Ariz. 1980). Shortly thereafter, Mr. Adamson learned that Mr. Schafer had indicated to a newspaper reporter that further negotiations with Mr. Adamson were antici-

⁵ After the sentencing, Mr. Schafer and Mr. Feldhacker had a conversation in which Mr. Schafer indicated that he was not sure what the State would do if the *Dunlap* and *Robison* convictions were reversed on appeal now that Mr. Adamson had been sentenced. Affidavit, Exhibit 2 to Petitioner's Response to Motion to Dismiss Petition, *Adamson v. Hill, supra*.

pated. JA 144.⁶ Subsequently, Mr. Adamson consulted his attorneys regarding his responsibilities under the plea agreement. JA 144. Mr. Adamson's attorneys informed him that, in their opinion, his obligations under the agreement had ended. JA 144; *see* JA 52, 91.

On April 2, 1980, one of Mr. Adamson's attorneys, Mr. Feldhacker, was contacted by one of the State's attorneys requesting an interview with Mr. Adamson. JA 200. In response to this request, Mr. Feldhacker wrote a letter the next day, stating:

John Harvey Adamson believes that he has fully complied with, and completed, his plea agreement entered into with the State of Arizona. It is, therefore, his position that future testimony in any case involving the defendants Max Dunlap and James Robison regarding the killing of Don Bolles will only be given upon the offer of further consideration by the State of Arizona.

JA 201. The letter went on to the state that Mr. Adamson was "aware of the fact that [the prosecutor's] . . . office may feel that he has not completed his obligations under the plea agreement . . . and . . . may attempt to withdraw that plea agreement from him." *Ibid.* But it

re-emphasize[d] the point that it is Mr. Adamson's position that he has fully and completely, and in good faith, fulfilled all his obligations under the plea agreement. The plea agreement was drafted in such a manner that it was anticipated to be concluded prior to Mr. Adamson's sentencing.

JA 203.

The body of the letter set out the terms under which Mr. Adamson was willing to testify. *See* JA 201-203. As

⁶ *See the Arizona Republic*, March 9, 1980, page B-1; *Phoenix Gazette*, March 13, 1980, 1st home ed., pages A1, A4.

summarized by the Court of Appeals, they were the following:

(1) release from custody after testifying; (2) to be held in a non-jail facility with full-time protection during the retrials; (3) a complete set of clothing; (4) protection for his ex-wife and son; (5) an educational fund for his son; (6) transportation and funds for establishing a new identity outside of Arizona; and (7) full and complete immunity for all crimes in which he may have been involved, stipulating that none were murders.

JA 180, n.2. In response to Mr. Feldhacker's letter, Mr. William Schafer wrote back stating that, because of Mr. Feldhacker's letter,⁷ Mr. Adamson had violated the agreement and was subject to prosecution for the Bolles murder. JA 205.

On April 18, 1980, Mr. Adamson was called to testify in pretrial proceedings in the *Dunlap* and *Robison* case, before Judge Robert L. Myers of the Maricopa County Superior Court. JA 50. In response to questions, on advice of counsel, Mr. Adamson invoked his Fifth Amendment privilege against self-incrimination. JA 50-51, 147. Judge Myers initially overruled the claim of privilege, and ordered Mr. Adamson to answer, until Mr. Feldhacker explained his belief that Mr. Adamson was "now, pursuant

⁷ Mr. Schafer's letter, which was dated April 9, 1980, stated that: On April 9, the state did call upon Mr. Adamson, through you, for an interview regarding his testimony at the trial. As Mr. Adamson's attorney you refused to allow him to be interviewed.

JA 205. Mr. Feldhacker's letter had referred to a "telephone conversation of April 2, 1980, wherein we discussed the availability of John Adamson for interviews" JA 200. Throughout the remainder of the parties' arguments and pleadings, the only "refusal" pointed to is the letter by Mr. Feldhacker. See, e.g., JA 79, 94-5. Respondent is not aware of any April 9 "refusal" to permit an interview. The reference to the call of April 9 in Mr. Schafer's letter may well refer to the April 2, 1980 conversation that preceded Mr. Feldhacker's letter.

to correspondence from the prosecution, subject to being prosecuted for the killing of Don Bolles on a first degree murder charge." JA 50.

[T]he letter is already in the Court file that I have received from the Attorney General's office. Obviously it is their position under paragraph 3 that a refusal of John Adamson to submit to interviews is a violation of the plea agreement and, as the letter carries on, it talks not only about prosecuting John Adamson for the killing of Don Bolles, but prosecuting him for many other crimes as well.

JA 51.⁸ After hearing this argument, Judge Myers reversed himself and declined to order Mr. Adamson to answer the questions. JA 53.

The Attorney General's office next filed a motion to compel, requesting that Judge Myers order Mr. Adamson to testify pursuant to the plea agreement. JA 54-55. Assistant Attorney General Stan Patchell argued that Mr. Feldhacker's position—that the plea agreement "has been fulfilled"—was incorrect and urged Judge Myers to "construe the agreement . . . and make a ruling and a determination as to whether or not Mr. Adamson must testify." JA 57.⁹ Judge Myers denied the State's motion.

⁸ Mr. Feldhacker also made it clear to Judge Myers that it was his position that "Judge Birdsall . . . must preside over the actual question of whether or not that plea agreement has been completed, whether or not the State is in violation of the agreement, whether or not John Adamson is in violation of the agreement" JA 52. Since the State had not filed any motion in front of Judge Birdsall, Mr. Feldhacker argued that "I don't think anyone at this point in time has jurisdiction over that plea agreement" JA 61.

⁹ In his argument, Mr. Patchell himself appeared uncertain about the implications of Mr. Adamson's actions. He argued, "It is at least contempt on the part of Mr. Adamson to refuse to testify at this point, if not a complete violation of the plea agreement." JA 56. He asked the court to construe the agreement "so that the witness Adamson may know whether or not he is in violation of the plea agreement and whether or not he is compelled to testify pursuant to the plea agreement at this hearing." JA 57.

JA 58. Mr. Adamson then declined to answer questions, stating that he was "taking the Fifth Amendment on advice of counsel," and refusing to testify "[u]nder the circumstances. . . ." JA 58-59.¹⁰ The State sought review of Judge Myers' ruling by the Arizona Supreme Court, but that court declined jurisdiction. JA 111.

6. *The Reinstitution of Capital Murder Charges, And The Proceedings in the Arizona Supreme Court.*

On May 8, 1980—while John Adamson remained in custody, serving his sentence for the killing of Don Bolles—the State filed a new "Information" charging him with first degree murder for that same crime. JA 62, 68. Mr. Adamson's lawyers moved to quash that Information. JA 64. In their motion to quash, Mr. Adamson's attorneys again contended that the matter could only be appropriately ruled on by Judge Birdsall, the sentencing judge. JA 76. On May 12, 1980, Judge William French denied the motion to quash, noting that the question of whether Mr. Adamson had breached the plea agreement could be determined at a later date. JA 64-65, 90, 99-100.

The next day, Mr. Adamson's attorneys sought review of Judge French's ruling by the Arizona Supreme Court. JA 63-66. In their application to the Arizona Supreme Court, they contended that the new Information violated Mr. Adamson's double jeopardy rights, and that it was improper for the State to proceed with the prosecution without "first obtain[ing] a competent legal ruling as to whether or not JOHN HARVEY ADAMSON is in viola-

¹⁰ Mr. Adamson said this twice. When questioned about the meaning of his response, "I am taking the Fifth Amendment on advice of counsel," he specified that it was "an answer as to why [he was] . . . taking the Fifth Amendment" JA 58-59. When asked whether his invocation of the Fifth Amendment applied to "all interviews, depositions, hearings, and trials," he twice stated: "Under the circumstances, yes." JA 59.

tion of his plea agreement prior to proceeding with the prosecution of him." JA 70. The State's answer argued that it was unnecessary to bring the matter before Judge Birdsall, and urged the State Supreme Court to take jurisdiction to determine "whether petitioner is obligated to testify under his agreement." JA 78-79. Mr. Adamson's lawyers then moved to dismiss the Special Action, without success. JA 80-81.

On May 28, 1980, oral argument was held before the Arizona Supreme Court. JA 88. In that argument, Mr. Feldhacker explained to the court his belief and advice to Mr. Adamson that his obligations under the plea agreement had ended with his sentencing (JA 91), with the limited and specific exception of the Ashford Plumbing case (JA 93). He also explained that Mr. Adamson's assertion of his Fifth Amendment rights before Judge Myers resulted from the notice to him, by Mr. Schafer's letter of April 9, 1980, "that he was subject to being prosecuted, not only for the killing of Don Bolles, but for any other crimes that they may find he had previously been given immunity for." JA 94. Mr. Feldhacker also informed the court that

There's a lot of explanation and a lot of things that go beyond the mere statements here, and . . . the record is legally inadequate for this court to make any rulings as to whether or not John Adamson was in violation of any agreement, because there is not any record as to what happened, what that means, any testimony, anything at all before this Court other than what I have raised in my petition.

JA 93. For the State, Mr. Schafer responded by pointing out the colloquy at Mr. Adamson's sentencing regarding discussions of the possible necessity of further testimony (JA 101), without directly addressing Mr. Feldhacker's contention that those discussions had been limited to the Ashford Plumbing case. Mr. Schafer also argued that

there was no need for a hearing to determine Mr. Adamson's breach (JA 94-95), and no reason to resubmit the matter to Judge Birdsall (JA 97-98), because the plea agreement called for "automatic" reinstatement of the charges (JA 99).

The next day, May 29, 1980, the Arizona Supreme Court issued an opinion which remanded Mr. Adamson for prosecution on the original Information charging open murder. JA 105-115. Rejecting Mr. Feldhacker's argument that paragraph 8 of the plea agreement terminated obligations for further testimony at the time of sentencing, the court quoted the colloquy at Mr. Adamson's sentencing, and said this:

If item 8 specifically appears to limit the availability of the petitioner for additional testimony, the foregoing exchange at the sentencing hearing amounted to a clear understanding that Adamson would testify after sentencing.

JA 113. The Arizona Court's decision made no mention of Mr. Feldhacker's representation that the only matter "discussed with counsel" prior to the sentencing was the still-unprosecuted Ashford Plumbing case. Stating that "[t]he record before us is replete with indications of petitioner's refusal to testify further in the Bolles murder cases"¹¹, the court concluded that "Petitioner has violated the terms of the plea agreement." JA 111, 113. The court then went on to reject Mr. Adamson's claim that his reprosecution would violate his double jeopardy rights, holding that the "plea agreement . . . by its very terms waives the defense of double jeopardy if the agreement is violated." JA 115.

¹¹ The record items before the Arizona Supreme Court which contained an "indication[]" of petitioner's refusal to testify" were the exchange of letters between Mr. Feldhacker and Mr. Schafer, and the partial transcript of the hearings before Judge Myers. See JA 79.

7. Mr. Adamson's Offer to Comply With the Agreement.

The Arizona Supreme Court's decision constituted the first judicial determination that Mr. Adamson was obligated to testify in the *Dunlap* and *Robison* retrials by the plea agreement. The next business day after it was filed, June 2, 1980, Mr. Adamson "renewed his offer to testify at the co-conspirators' retrial, under the terms of the original plea agreement." JA 165. As Mr. Adamson later related, the prosecutors refused:

The following Monday—Monday, June—June 2nd, I called my lawyers and it was arranged to—Stan Patchell from the Attorney General's Office was present in their office. I stated that while I felt uncomfortable from a legal standpoint, particularly a due process standpoint, and I felt that jeopardy had attached at the time of my sentencing, that the only right thing for me to do under the circumstances, since there now in fact had been a judicial determination that the plea agreement had been violated, was to continue the cooperation.

I told my lawyers, reinstate the 20 year plea agreement, give me enough immunity so I can answer the questions, and we'll continue prosecuting the case.

The State found that unacceptable. They demanded a life sentence of 25 years. Now, instead of saying please they were saying thank you by adding nine years onto my sentence.

JA 148. The State, instead, elected to dismiss the charges against Mr. Dunlap and Mr. Robison¹², and proceeded with the prosecution of John Adamson for first degree murder. JA 165.

¹² The prosecutions against Dunlap and Robison were dismissed without prejudice as to refile. See *Dunlap v. Corbin*, 9th Cir. No. 81-5054 (1982).

Mr. Adamson's lawyers then filed a Petition for a Writ of Habeas Corpus in the United States District Court for the District of Arizona, seeking to bar Mr. Adamson's prosecution on double jeopardy grounds. JA 116. That Petition was dismissed as frivolous and Mr. Adamson's request for an evidentiary hearing on it was denied. JA 132, 133-137. The dismissal was later affirmed in an unpublished opinion by a panel of the Court of Appeals for the Ninth Circuit. JA 156-163; *Adamson v. Hill*, 667 F.2d 1030 (9th Cir, 1981) [table], *cert. denied* 455 U.S. 992 (1982).

8. *Mr. Adamson's Trial and Death Sentence.*

Mr. Adamson's trial began on October 7, 1980.¹³ After several days of trial and lengthy jury deliberations, he was convicted of first degree murder. *State v. Adamson*, *supra*. The judge presiding at the trial was Judge Birdsall, and under Arizona law sentencing on this capital charge was his prerogative alone. Ariz. Rev. Stat. § 13-703.

At the sentencing hearing, the State rested its request for the death penalty on the circumstances of the crime. Reporters Transcript, *State v. Adamson*, Nov. 14, 1980, at 14-15. In mitigation, Mr. Adamson introduced evidence of his ongoing cooperation with law enforcement officials in past and pending criminal investigations. Two Assistant United States Attorneys, a special agent for the Federal Bureau of Investigation, and an officer with the Organized Crime Bureau of the Phoenix Police Department, all testified about the extent and value of Mr. Adamson's cooperation in these cases. *Id.* at 16-39. Mr. Adam-

¹³ Prior to this trial, Mr. Adamson renewed his offer to testify against Mr. Dunlap and Mr. Robison, on terms substantially harsher to him than those of the original plea agreement. JA 149. His offer was again rejected by the Arizona prosecuting authorities. JA 150.

son himself made a lengthy statement, expressing his remorse "for the unimagined pain, suffering and loss" he had caused (JA 152), his belief that he had never violated the plea agreement (JA 145-8),¹⁴ and his continued willingness to testify against the others involved in the Bolles murder and other crimes (JA 152-3).¹⁵

In his sentencing decision, Judge Birdsall found two statutory "aggravating circumstances" in the facts surrounding the murder of Don Bolles: that the crime was committed for "pecuniary gain," and was "heinous, cruel or depraved," making Mr. Adamson eligible for a death sentence under Ariz. Rev. Stat. § 13-703 (F)(5), and (6). Special Verdict, *State v. Adamson*, Nov. 14, 1980, at 2-3. Although he acknowledged that Mr. Adamson "has cooperated with the United States government and with the State of Arizona in criminal cases and in criminal investigations, [and] that at least some of these cases and investigations involve serious criminal activity, [and] that some of these matters are still pending and that the Defendant states that he is willing to continue this cooperation," Judge Birdsall found these mitigating circumstances were not "sufficiently substantial to warrant leniency," and imposed a sentence of death. *Id.* at 3. The

¹⁴ Mr. Adamson's statement emphasized that he had taken the position that his obligation to testify had ended on advice of counsel, and had anticipated that "there was going to be hearing certainly over the legal issue of where everybody stood according to the agreement" before he was held in breach. JA 144. He also said the following about his demands for additional consideration after the reversal of the *Dunlap/Robison* convictions: "I asked for the moon and I don't know what the usual process is for negotiating a plea agreement, but that's the way I started with it. It may be considered untutored, and perhaps it was in error, but it was done in good faith." JA 145.

¹⁵ Even during the trial itself, Mr. Adamson continued to cooperate in federal prosecutions, testifying in one federal criminal case during the weeks between his trial and sentencing. JA 148-149.

Supreme Court of Arizona affirmed both conviction and sentence, one Justice dissenting. *State v. Adamson*, 665 P.2d 972 (Ariz. 1983).

9. *The Habeas Corpus Proceedings Below.*

After state remedies were exhausted, Mr. Adamson filed another federal habeas corpus petition seeking relief from his conviction and sentence of death. JA 164. He again challenged his conviction and death sentence as a violation of "the Fifth, Eighth and Fourteenth Amendments," in light of his previous sentence of imprisonment for the same crime. JA 164. His Petition affirmatively alleged that he had attempted to obtain additional consideration for his testimony in the *Dunlap* retrial, which "he believed was not contemplated by the initial plea agreement," and that after the Arizona Supreme Court's decision, he had "renewed his offer to testify at the co-conspirator's retrial, under the terms of the original plea agreement." JA 165. The State's answer did not directly address these contentions. See Answer at 8, *Adamson v. Ricketts*, CR 23.

In District Court, Mr. Adamson moved for an evidentiary hearing into the facts underlying this claim, and his attorneys sought the appointment of new counsel because they were witnesses to these events. JA 167-173. Both motions were denied by the District Court, in an Order dismissing the habeas corpus petition without a hearing. See Order at 12-13, *Adamson v. Ricketts*, CR 24. It was this Order that was reversed by the *en banc* Court of Appeals. *Adamson v. Ricketts*, 789 F.2d 722 (9th Cir. 1986).

SUMMARY OF ARGUMENT

John Harvey Adamson's first degree murder conviction and death sentence were imposed for a crime as to which he had already pled guilty, and for which he had been

sentenced and spent over three years in prison. Clearly, this violated the Double Jeopardy Clause of the fifth amendment unless something Mr. Adamson did removed its protections.

The Court of Appeals properly held that, in this context, the appropriate standard for determining whether the protections of the Double Jeopardy Clause have been forfeited is the traditional one, applicable generally to federal constitutional rights: a voluntary, knowing and intelligent waiver.

The finding by the Court of Appeals that no such waiver occurred here did not disregard any factual findings made by the state courts. The determination of whether federal constitutional protections apply, or have been removed, is inevitably a question of federal law, on which federal courts cannot defer to a state court's determination. The state did not argue in the Court of Appeals that the Arizona State Court had found as a fact that Mr. Adamson "understood" his actions were waiving his double jeopardy rights. A fair reading of the Arizona Supreme Court opinion from which the Solicitor General would extrapolate that finding shows that the Arizona court was speaking of a distinct, state law contract issue, whose resolution required no inquiry as to Mr. Adamson's actual state of mind. The material facts regarding Mr. Adamson's beliefs and intendment were not developed in state court. The Court of Appeals correctly found that the present record overwhelmingly supports Mr. Adamson's allegation, in his habeas corpus petition, that the testimony for which he attempted to obtain additional consideration "he believed was not contemplated by the initial plea agreement." JA 165.

What this case is all about is nothing more or less than the consequences of a legitimate disagreement between the prosecution and a defendant who pleads guilty and

turns state's evidence, regarding the construction of the plea bargain between them. Mr. Adamson requested new concessions for his testimony in the honest and reasonable belief that he had already performed the terms of the plea bargain in full by testifying as a prosecution witness on several earlier occasions, and that the additional testimony now sought was beyond the scope of the bargain. He directly refused to answer questions when called, because the prosecution had asserted he was already in breach of the agreement, and subject to reprosecution. The state judge presiding at that time held that Mr. Adamson's claim of privilege was justified. Mr. Adamson persisted in his position only until the Arizona Supreme Court issued a ruling which rejected his construction of the plea bargain and held that it did require him to testify again. Then, while there was still ample time for him to testify, he offered to do so; and he has since stood ready and willing to abide by the agreement as judicially construed.

It is undisputed and indisputable that Mr. Adamson's refusal to testify was only temporary; it was explicitly based upon the advice of counsel and upon a plausible, good-faith interpretation of the plea agreement; it was abandoned immediately as soon as that interpretation was adjudicated to be incorrect; and it never deprived the prosecution of the benefit of the plea agreement or prejudiced the prosecution in any other way. Under these circumstances, it can hardly be said that the decision of the Court of Appeals below "renders plea agreements . . . almost entirely unenforceable by the government, at least to the extent they impose future obligations on the defendant." Sol. Gen. Br. 24.

All that the Court of Appeals held was that Mr. Adamson could not be placed a second time in jeopardy of life upon the fiction that he had "waived" the constitutional right to double jeopardy by disavowing the very plea bargain upon which his legal position rested, and which he

has always said that he intended fully to obey. All that its decision gave Mr. Adamson is what the Solicitor General concedes will fully satisfy every justifiable governmental interest in the bargain: the opportunity, before being stripped of the fifth amendment protection, and ultimately of his life, to "comply with the terms of the agreement," after they had been "settled" by a court, at least "as long as the value of the defendant's cooperation has not diminished during the recalcitrance." Sol. Gen. Br. at 21n.11.

The ability of the government to obtain defendants' cooperation would be substantially undermined by a holding that—even after a sentence has been imposed and extensive cooperation has been given—any dispute with the government can result in a loss of all the benefits of a plea bargain, a waiver of double jeopardy, reprosecution, and even death. In the long run, the government's ability to bargain for testimony is enhanced, not undermined, by safeguards against prosecutors' overreaching. The government's ability to ensure that cooperation agreements are obeyed can easily and adequately be protected by the common practice of deferring acceptance of a cooperating defendant's plea, or the imposition of sentence on him, until after his testimony is completed.

ARGUMENT

I. THE PROTECTIONS AFFORDED BY THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT CAN BE FORFEITED ONLY BY A CRIMINAL DEFENDANT'S KNOWING AND VOLUNTARY ACTION.

There is no question that, after John Harvey Adamson was sentenced to prison for the murder of Don Bolles, the Double Jeopardy Clause of the fifth amendment stood as a bar to his reprosecution for that same crime. See *Arizona v. Rumsey*, 467 U.S. 203 (1984); *Brown v. Ohio*, 432 U.S.

161 (1977). The Arizona Supreme Court itself agreed "that at the time [Mr. Adamson] . . . was sentenced jeopardy attached," *Adamson v. Superior Court*, 611 P.2d 932, 937 (Ariz. 1980) (JA 115), and petitioner does not dispute this. The question presented here, then, is whether something Mr. Adamson did after his sentencing deprived him of the double jeopardy protection he had acquired.

The Court of Appeals' opinion assumed that this question is governed by waiver principles that have long been axiomatic of this Court's constitutional jurisprudence:

"[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . 'do not presume acquiescence in the loss of fundamental rights.'" *Johnson v. Zerbst* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L. Ed. 1461 (1938) . . . Before finding that a defendant has waived a right, a court must be convinced that there was "an intentional relinquishment or abandonment of a known right or privilege." *U.S. v. Anderson*, 514 F.2d 583, 586 (7th Cir. 1975) quoting *Zerbst*, 304 U.S. at 464, 58 S.Ct. at 1023). In situations involving other constitutional rights, we have required a finding that the defendant's waiver was "made voluntarily, knowingly, and intelligently." *U.S. v. Cochran*, 770 F.2d 850, 851, (9th Cir. 1985) (waiver of right to jury trial). Furthermore, given the importance of the right, such waiver must be made expressly, rather than implied by conduct. Cf. *Menna v. New York*, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) (per curiam) (will not imply waiver of double jeopardy rights from guilty plea in second prosecution).

Adamson v. Ricketts, *supra*, 789 F.2d at 727; JA 186. Both petitioner and the Solicitor General fault this analysis, arguing that this Court has held that the rights protected by the Double Jeopardy Clause can be forfeited without the "knowing and intelligent" waiver required to with-

draw other rights protected by the Constitution. Pet. Br. 18; Sol. Gen. Br. 11, 14.

This Court has said exactly the opposite, that it has "applied the *Johnson* criteria to assess the effectiveness of a waiver of . . . the right to be free from twice being placed in jeopardy." *Schneckloth v. Bustamonte*, 412 U.S. 218, 237-8 (1973), citing *Green v. United States*, 355 U.S. 184 (1957). The Court also squarely refused to imply a waiver of double jeopardy rights in *Menna v. New York*, *supra*. Virtually every federal Circuit has agreed with the Court of Appeals' position here—that asserted waivers of double jeopardy rights are to be measured by the same *Johnson v. Zerbst* standard that controls waiver issues implicating virtually all other individual rights protected by the Constitution.¹⁶

The arguments made here to the contrary rest on truncated quotations, taken from decisions of this Court applying the Double Jeopardy Clause in wholly different contexts, contexts in which the Court has held the very concept of "waiver" inapposite. These cases "implicitly rejected" a waiver analysis of questions regarding "the permissibility of a retrial following a mistrial or reversal of

¹⁶ See, e.g., *United States v. Anderson*, *supra*, 514 F.2d at 586; *Hoffer v. Morrow*, 797 F.2d 348, 350 (7th Cir. 1986); *Launius v. United States*, 575 F.2d 770, 772 (9th Cir. 1978); *United States v. Rich*, 589 F.2d 1025, 1032 (10th Cir. 1978); *United States v. Young*, 503 F.2d 1072, 1075 (3rd Cir. 1974); *Galloway v. Beto*, 421 F.2d 284, 288 n.4 (5th Cir.), cert. denied, 400 U.S. 912 (1970); *Oksanen v. United States*, 362 F.2d 74, 81 (8th Cir. 1966); and see *United States v. Broce*, 781 F.2d 792, 795 (10th Cir. 1986) (en banc) (holding that the Double Jeopardy Clause is an "absolute" inhibition upon the government's right to institute a proceeding in certain circumstances, and not an "individual right which is subject to waiver.") See also e.g., *Turner v. United States*, 459 A.2d 1054, 1056 (D.C. Ct. of App. 1983); *Carbaugh v. State*, 449 A.2d 1153, 1155 (Md. 1982); *State v. Cain*, 324 So.2d 830, 834 (La. 1975).

a conviction on appeal," *United States v. Dinitz*, 424 U.S. 600, 609 n.11 (1976), not for all purposes relating to the Double Jeopardy Clause.

The cases involving mistrials or the appeal of a conviction turn on special aspects of double jeopardy analysis presented by those situations that make the idea of "waiver" ill-fitted to solve them. First, the cases recognize that the idea of "waiver" in that context is "wholly fictional." *Green v. United States*, *supra*, 355 U.S. at 192. "Usually no such waiver is expressed or thought of." *Ibid.*, quoting *Kepner v. United States*, 195 U.S. 100, 135 (1904) (dissenting opinion of Justice Holmes). Second, they understand that, from the defendant's point of view the "choice" expressed by an appeal or mistrial motion is "no meaningful choice" at all. *Green v. United States*, *supra*, 355 U.S. at 192. "In such circumstances the defendant generally does face a 'Hobson's choice' between giving up his first jury and continuing a trial tainted by prejudicial judicial or prosecutorial error." *United States v. Dinitz*, *supra*, 424 U.S. at 609. Third, they have perceived that there are implications to values protected by the Double Jeopardy Clause on both sides of that "Hobson's choice," but no core double jeopardy concerns on either: by electing to request a new trial, the defendant does not give up a "constitutional right comparable to the right of counsel" involved in *Johnson v. Zerbst*, but simply a corollary "interest in going forward before the first jury," *id.* at 424 U.S. at 609 n.11; and he gains some "protection against multiple prosecutions" by "the concomitant relinquishment of the opportunity to obtain a verdict from the first jury," *ibid.* Finally—although the Court has not fully clarified the law on this score—it is possible that, in situations involving mistrials or appellate reversals, the defendant is not "twice put in jeopardy" at all because the "criminal proceedings against an accused have not run their full course." *Price v. Georgia*, 398 U.S.

323, 326 (1970); see *Richardson v. United States*, 468 U.S. 317, 325 (1984); *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 308 (1984).

The situation here has none of these attributes that make "waiver" analysis inappropriate. Here, what has been at issue from the beginning is whether John Adamson "waive[d] the defense of double jeopardy" *Adamson v. Superior Court*, *supra*, 611 P.2d at 937; JA 115. Mr. Adamson did not request a mistrial, appeal, withdraw his guilty plea or in any way attempt to undercut the finality of his original conviction and sentence.¹⁷ He obtained no benefit for his alleged implicit waiver. What he lost was not just some corollary constitutional "interest," but one of the most basic protections of the Double Jeopardy Clause—the protection "against a second prosecution for the same offense after conviction," *Brown v. Ohio*, *supra* 432 U.S. at 165. For with the entry of judgment and sentence against him, with no right to appeal, the "criminal proceedings against [Mr. Adamson]

¹⁷ It is this fact that distinguishes the cases cited by petitioner and the Solicitor General, which hold that a retrial on all original charges is permissible after defendant successfully moves to vacate a guilty plea to a lesser charge. See Pet. Br. 26; Sol. Gen. Br. 15. We have no quarrel with these cases. They properly recognize that in these circumstances it is only the defendant's guilty plea to the conviction offense that causes him to be "put in jeopardy" at all. By choosing to vacate that conviction, the defendant necessarily elects to erase the precise legal event that would otherwise provide him with double jeopardy protection. Thus, such a motion can only be construed as a "deliberate election" to forgo double jeopardy rights. See *Lowery v. Estelle*, 696 F.2d 333, 340 (5th Cir. 1983); *Klobuchir v. Pennsylvania*, 639 F.2d 966, 970 (3d Cir. 1981); *Hawk v. Berkemer*, 610 F.2d 445, 447-8 (6th Cir. 1979); *United States v. Johnson*, 537 F.2d 1170, 1174 (4th Cir. 1976); *United States v. Jerry*, 487 F.2d 600, 606 (3d Cir. 1973); *Ward v. Page*, 424 F.2d 491, 493 (10th Cir. 1970); *United States v. Myles*, 430 F.Supp. 98, 101-102 (D.D.C. 1977).

... ha[d] run their full course." *Price v. Georgia*, *supra*, 398 U.S. at 326.¹⁸

This Court's cases rejecting "waiver" analysis in these different contexts thus are not in point here. The circumstances of this case presented a classic waiver issue—and the state, district and circuit courts have all evaluated it in those terms.¹⁹

Ultimately, however, we believe the same basic principle—the presumption against the loss of constitutional rights unless a defendant has chosen to forfeit them—controls this case, "whatever the rationalization," *Green v. United States*, *supra*, 355 U.S. at 189. Even in the cases where the Court has abjured a formal "waiver" analysis, it nevertheless has made the protections of the constitution turn on the defendant's "voluntary choice," *United States v. Scott*, 437 U.S. 82, 99, (1977), removing them from him only upon "a deliberate election on his part to forego his valued right," *id.* at 437 U.S. 93. See *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982). It has allowed multiple trials only in "situations in which the defendant is responsible

¹⁸ In addition, the trial court's imposition of prison sentence, based on an explicit finding under Ariz. R. Crim. Pro. 17.4(d), that such a sentence was "appropriate," effectively amounted to "a resolution" of Mr. Adamson's case, *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977), and carried qualitatively different double jeopardy implications than the imposition of a prison sentence in a non-capital case. *Bullington v. Missouri*, 451 U.S. 430 (1980); *Arizona v. Rumsey*, *supra*. In that aspect, too, this case is distinguishable from the guilty plea cases petitioner relies on, which are governed by different rules of *North Carolina v. Pearce*, 395 U.S. 711 (1969). See, e.g., *United States v. Whitley*, 759 F.2d 327, 331 (4th Cir. 1985); *United States Ex Rel. Williams v. McMahon*, 436 F.2d 103, 106 (2d Cir. 1970) *cert. denied* 402 U.S. 914 (1971).

¹⁹ See *Adamson v. Superior Court*, *supra*, 611 P.2d at 937 (JA 115); *Adamson v. Hill*, U.S.D.C. Ariz. CIV 80-502 PHX CAM (JA 136); *Adamson v. Ricketts*, *supra*, 789 F.2d at 727, 729 (JA 185-186).

for the second prosecution," *United States v. Scott*, *supra*, 437 U.S. at 96, emphasizing that is what the defendant "expressly asks for" and "elects to have," *Jeffers v. United States*, 432 U.S. 137, 152 (1977) (plurality opinion). And it has made this clear: "The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed" *United States v. Dinitz*, *supra*, 424 U.S. at 609; see *Oregon v. Kennedy*, *supra*, 456 U.S. at 676, and *id.* at 683 (concurring opinion of Justice Stevens).

We do not read these cases, as petitioner would, to give the Double Jeopardy Clause second class status among the protections of the Bill of Rights. We believe they show the same regard for its protection—one "clearly 'fundamental to the American scheme of justice'", based upon principles that "from the very beginning [have] been part of our constitutional tradition," *Benton v. Maryland*, 395 U.S. 784, 796 (1969)—that the Court has shown for other fundamental constitutional guarantees, before and since *Johnson v. Zerbst*. Whether it is called a "waiver" or an "election," whether the decision must be characterized as "intentional," "knowing," "deliberate," or simply "voluntary," the question is essentially the same. The Court of Appeals did not err in posing that issue here in those terms.

II. THE COURT OF APPEALS' DECISION DID NOT CONTRAVENE ANY FACTUAL DETERMINATION MADE BY THE SUPREME COURT OF ARIZONA WHICH WAS ENTITLED TO DEFERENCE UNDER 28 U.S.C. § 2254 (d).

The Court of Appeals was cognizant of its responsibility, in this habeas corpus proceeding, to defer to state court factual determinations, but to decide federal constitutional issues for itself:

The Arizona Supreme Court's finding of a waiver does not preclude this court's own inquiry into that issue. Whether Adamson's actions constituted a waiver of a constitutional right is determined by federal law. *Gladden v. Unsworth*, 396 F.2d 373, 376 (9th Cir. 1968). In a habeas review a federal court must presume the correctness of a state appellate court's finding of fact unless one of the seven circumstances provided for in 28 U.S.C. § 2254(d) is present or if the state court finding of fact is not fairly supported by the record and the federal court provides a written explanation for its conclusion. *Sumner v. Mata*, 455 U.S. 591, 592-93, 102 S.Ct. 1303, 1304-05, 71 L.Ed.2d 480 (1982) (per curiam).

Section 2254(d), however, applies only to questions of "basic, primary, or historical fac[t]." *Strickland v. Washington*, 466 U.S. 668, 698, 104 S.Ct. 2052, 2070, 80 L.Ed.2d 674 (1984) (quoting *Townsend v. Sain*, 372 U.S. 293, 309 n.6, 83 S.Ct. 745, 755 n.6, 9 L.Ed.2d 770 (1963)). When the issue includes a mixed question of law and fact or questions of law, section 2254(d) does not require giving a presumption of correctness to the state court's findings. See *Fendler v. Goldsmith*, 728 F.2d 1181, 1190 n. 21 (9th Cir. 1984).

This case presents a mixed question of law and facts. Section 2254(d) applies to "historical" facts, such as whether Adamson signed the agreement, but it does not apply to whether his actions constituted waiver of double jeopardy. See *Sumner v. Mata*, 455 U.S. at 597, 102 S.Ct. at 1306-07 (questions of fact governed by section 2254(d), but reviewing court may accord "different weight to the facts"); *Fendler v. Goldsmith*, 728 F.2d at 1190 n.21. Cf. *Miller v. Fenton*, ___ U.S. ___, 106 S.Ct. 445, 451, 88 L.Ed.2d 405 (1985) ("voluntariness of a confession is a matter of independent federal determination").

Adamson v. Ricketts, *supra*, 789 F.2d 727-28 n.5; JA 187-188. Petitioner and the Solicitor General take different tacks in their effort to fault the Court of Appeals'

position on this score. Petitioner contends that it was the state court's "determin[ation of] the obligations of the parties" under the plea agreement, and its "conclu[sion] that Adamson had breached the agreement" that were "entitled to a presumption under 28 U.S.C. § 2254(d)." Pet.Br. 14. The Solicitor General focuses on a different point, in its heavily edited discovery of a "definitive factual finding that respondent 'clearly underst[ood]' his obligations" Sol.Gen.Br. at 20 n.10. We do not believe either of these assertions can withstand scrutiny; we will address each of them in turn.

A. The Court of Appeals Properly Recognized That There Is a Difference Between the Breach of a State Contract and the Waiver of a Federal Constitutional Right.

The initial flaw in the petitioner's analysis of this issue lies in its confounding of factual and legal issues. Section 2254(d) speaks only to the former; it provides:

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of State court, a determination after a hearing on the merits of a *factual issue* . . . evidenced by a written finding, written opinion, or other reliable and written indicia, shall be presumed to be correct [absent certain circumstances]. . . .

(Emphasis added). The Arizona Supreme Court's determination of the scope of the obligations of the plea agreement was plainly not "a determination . . . of a factual issue" It involved, as even petitioner occasionally seems to acknowledge, legal "conclusions." Pet.Br. at 14. As the Court of Appeals recognized, § 2254(d) simply has no application to "conclusions" and "interpretations" of obligations imposed by state law.

Of course, that does not mean that the Arizona Supreme Court's reading of the plea agreement, as a

contract, was not entitled to deference by the federal courts. The Court of Appeals carefully respected the Arizona Supreme Court's "conclusions" insofar as they determined state law obligations. See *Adamson v. Ricketts*, *supra*, 789 F.2d at 729 (JA 192). But as both the Court of Appeals and the Arizona Supreme Court saw, two separate legal questions are presented here: one involves the scope of the obligations imposed on Mr. Adamson by the plea agreement; the other involves the extent, and effect, of any waiver of double jeopardy rights that could be implied from the agreement and Mr. Adamson's subsequent actions. See *Adamson v. Superior Court*, *supra*, at 611 P.2d 936, 937 (JA 111-113, 115); *Adamson v. Ricketts*, *supra*, 789 F.2d at 729-730 (JA 189-190). The Court of Appeals never questioned the Arizona Supreme Court's decision on the first of these issues; but it properly recognized its own independent responsibility to decide the second.

That cannot have been error. "The question of a waiver of federally guaranteed constitutional rights is, of course, a federal question controlled by federal law." *Brookhart v. Janis*, 384 U.S. 1, 4 (1964); accord *Garrity v. New Jersey*, 385 U.S. 493, 498 (1967); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Lefkowitz v. Turley*, 414 U.S. 70, 84-5 (1973).²⁰

When constitutional rights turn on the resolution of a factual dispute we are duty bound to make an independent examination of the evidence in the record. See e.g. *Edwards v. South Carolina*, 372 U.S. 229, 235; *Blackburn v. Alabama*, 361 U.S. 199, 205, note 5.

²⁰ See also *Murray v. Carrier*, 106 S.Ct. 2639, 2650 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 83 n.8 (1977); *Lefkowitz v. Newsome*, 420 U.S. 283, 290 n.6 (1975); *Barker v. Vingo*, 407 U.S. 514, 523-9 (1972); *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *Douglas v. Alabama*, 380 U.S. 415, 422-3 (1965); *Fay v. Noia*, 372 U.S. 391, 438-9 (1963); *Townsend v. Sain*, 372 U.S. 293, 309 n.6, 318 (1963); *Parker v. Illinois*, 333 U.S. 571 (1948).

Brookhart v. Janis, *supra*, 384 U.S. at 4 n.4. This Court has recently reaffirmed that principle, *Miller v. Fenton*, 106 S.Ct. 445 (1985), and has never deviated from it.

The ultimate responsibility of the federal courts to answer questions touching on federal constitutional rights is not eliminated because they arise out of a contract. *Santobello v. New York*, 404 U.S. 257 (1971).²¹ Nor is it reduced by the fact that the federal question is closely related—or even nominally identical—to a parallel state law issue. Events occurring in the course of a state criminal prosecution often have simultaneous state-and federal-law implications; the federal questions so presented must nonetheless be independently decided by the federal courts.²² Particularly, this Court has always

²¹ This general principle long predates *Santobello*, and is not limited to cases involving plea bargain agreements. In its contract clause decisions, for example—where the federal and state questions of whether a contract obligation existed may be by all appearances identical—the Court has always been careful to keep federal and state law distinct.

The decision of the supreme court of a state construing and applying its own constitution and laws, generally is binding upon this court; but that is not so where the contract clause of the Federal Constitution is involved. In that case, this court will give careful and respectful consideration and all due weight to the adjudication of the state court, but will determine independently thereof whether there be a contract, the obligation of which is within the protection of the contract clause, and whether that obligation has been impaired; and likewise, will determine for itself the meaning and application of a state constitution or statutory provisions said to create the contract or by which it is asserted an impairment has been effected.

Coombes v. Getz, 285 U.S. 434, 441 (1932).

²² See *Ford v. Wainwright*, 106 S.Ct. 2595, (1986) (a capital defendant's competency to be executed, under the Eighth Amendment); *Lee v. Illinois*, 106 S.Ct. 2056 (1986) (the reliability provided by a hearsay exception, for purposes of the Confrontation Clause); *Brown v. Ohio*, *supra*, 432 U.S. at 166 (whether two state statutes define the "same offense," for purposes of the Double Jeopardy Clause); *Rogers v.*

reserved to itself the ultimate decision of whether a criminal defendant's actions, in light of a procedural rule created and defined by state law, forfeited the protection of the federal constitution.²³ Just last term, in *Smalis v. Pennsylvania*, 106 S.Ct. 1745 (1986), the Court refused to defer to the state court's holding that the defendant's invocation of a state-created "demurrer" procedure constituted an "election" which withdrew any Double Jeopardy Clause bar against a state appeal:

We of course accept the Pennsylvania Supreme Court's characterization of what the trial judge must consider, in ruling on a defendant's demurrer. But . . . the Pennsylvania Supreme Court's characterization, as a matter of double jeopardy law, of an order granting a demurrer is not binding on us.

106 S.Ct. at 1748 n.5.

The Court of Appeals' treatment of the Arizona Supreme Court's interpretation of the plea agreement was consistent with these principles. To do what petitioner suggests—to make the Arizona Supreme Court determinations of the contract's meaning and breach the major and minor premises of a syllogism inevitably concluding in a waiver of constitutional rights—would be to abandon independent federal review of the latter ques-

Richmond, 365 U.S. 534, 540-544 (1961) (voluntariness of a confession under state and federal law). See also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-433 (1982) (a determination of whether state law creates a property right for purposes of the due process clause); *Liner v. Jafco, Inc.*, 375 U.S. 301 (1964) (mootness under federal and state law); *Great Northern Railway Company v. Washington*, 300 U.S. 154, 167 (1937) (the situs of a debt, for purposes of the interstate commerce clause).

²³ See *James v. Kentucky*, 466 U.S. 341, 348-9 (1984), and cases there cited; *Lefkowitz v. Newsome*, 420 U.S. 283, 293 (1975), and *id.* at 300 (dissenting opinion of Justice White).

tion. It would also confuse two qualitatively distinct bodies of law:

Although unintentional breaches of contract can form the basis for damages in civil contract litigation, such principles are inappropriate to determine whether a defendant in a criminal action has . . . waived a constitutional right.

Adamson v. Ricketts, *supra*, 789 F.2d at 729. The Arizona Court's decision on the state contract issue did not answer the federal double jeopardy question. The Court of Appeals properly did.

B. *The Arizona Supreme Court Did Not Find, and Could Not Properly Have Found, That Mr. Adamson Understood He Was Waiving His Double Jeopardy Rights.*

Neither in its arguments to the Court of Appeals nor in its petition or brief here, has petitioner identified in the Arizona Supreme Court opinion any factual findings regarding John Harvey Adamson's actions and intentions which should be presumed correct under 28 U.S.C. § 2254(d). The Solicitor General's brief filed in this Court, however, pulls from context two words in the Arizona Supreme Court's decision, to assert that the court made a "definitive factual finding that respondent 'clearly underst[ood]' his obligations" when he violated them. Sol.Gen.Br. 20 n.10. Petitioner never made that claim below, so the Court of Appeals had no occasion to address it; but because Mr. Adamson's intentions are a key to this case, we will nonetheless address it here.

The passage from which the Solicitor General purports to derive this "finding" appears in the Arizona Court's discussion of the contract issue of "the terms of the plea agreement." *Adamson v. Superior Court*, *supra*, 611 P.2d

at 936; JA 111, 113.²⁴ The Arizona Supreme Court has just quoted the colloquy at Mr. Adamson's sentencing, regarding the matters "discussed with counsel"; it then goes on to say:

If item 8 specifically appears to limit the availability of the petitioner for additional testimony, the foregoing exchange at the sentencing hearing amounted to a clear understanding that Adamson would testify after sentencing.

JA 113. With punctuation only partly revealing the extent of its editing, the Solicitor General's brief would change this to a "definitive factual finding that respondent 'clearly underst[ood]' his obligations" Sol.Gen.Br. 20n.10. The discovery of this "finding" obviously requires substantial editorial reworking of the Arizona Supreme Court's language—changing an adjective into an adverb and a noun into a verb; assuming Mr. Adamson is the subject of the verb; assigning the verb a tense fixing it at a different time; and adding Mr. Adamson's "obligations" as its object. More importantly, the Solicitor General's editing produces a fundamental change in the meaning of the passage.

In the context in which the Arizona Supreme Court was writing—the context of contract law—the word "understanding" is a term of art. Like most terms in modern contract law, it speaks to objective factors and says nothing about subjective beliefs.²⁵

²⁴ The presumption embodied by § 2254(d) does not apply, of course, unless the factual issue decided in state court is the same factual issue presented in the federal habeas proceeding. Cf. *Kimelman v. Morrison*, 106 S.Ct. 2574, 2591 (1986).

²⁵ As Justice O'Connor wrote for the Arizona Court of Appeals:

A contract is construed in accordance with the intention of the parties as 'judged by objective standards and not by their secret intentions or motives.' *Franklin Life Insurance Co. v. Mast*, 435 F.2d 1038, 1045 (9th Cir. 1970). Arizona courts have held:

"It is not the undisclosed intent of the parties with which we

Understanding. In the law of contracts, an agreement. An implied agreement resulting from the express terms of another agreement, whether written or oral. A valid contract engagement of a somewhat informal character. This is a loose and ambiguous term, unless it be accompanied by some expression to show that it constituted a meeting of the minds of the parties upon something respecting which they intended to be bound. See Agreement, Contract.

BLACK'S LAW DICTIONARY 1369 (5th Ed. 1979). Section 2254(d) neither commands nor permits federal courts to play with words in this fashion, to create a finding of fact on one issue from a state court's pronouncement on another.

If the Arizona Court's statement could be construed as a finding that Mr. Adamson subjectively "understood" he was obliged to testify at the *Dunlap/Robison* retrial when he asserted through counsel he was not, that finding still would not qualify for deference under the standards of 28 U.S.C. § 2254(d). We doubt whether the manner in which it was reached can be called a "full, fair and adequate hearing" under § 2254(d)(6).²⁶ Even if it was, it was on this

are concerned, but the outward manifestations of assent. This principle of law is expressed well by Justice Holmes: ' . . . the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs. . . . ' Holmes, *The Path of the Law*."

. . .
Sam Levitz Furniture Co. v. Safeway Stores, Inc., 10 Ariz. App. 225, 228, 457 P.2d 939, 941 (1969), rev'd on other grounds, 105 Ariz. 329, 464 P.2d 612 (1970).

Helena Chemical Co. v. Coury Bros. Ranches, Inc., 616 P.2d 908, 913 (Ariz. App. 1980).

²⁶ The expedited, open-ended proceedings in the Arizona Supreme Court gave Mr. Adamson's counsel scant notice of the issues that would be decided there, and no real opportunity to "present[] material relevant" to their position or "to challenge or impeach" the

precise point that "the material facts were not adequately developed at the State court hearing" 28 U.S.C. § 2254(d)(3). The Arizona Supreme Court declined Mr. Adamson's counsel's request for the opportunity to present testimony about the events beyond the record that bore on their perception of the obligations imposed by the agreement. JA 93. As a result, that court did not have before it the evidence which shows that the discussions and the "understanding" reflected in the colloquy at sentencing "involved a wholly separate prosecution," *Adamson v. Ricketts*, *supra*, 789 F.2d at 727 n.5 (JA 187n.5), as petitioner effectively concedes. Pet. Br. 22.²⁷ Had the Arizona court heard that evidence, surely it would have not inferred a general "understanding" regarding further testimony in the Bolles case and the status of Mr. Adamson's double jeopardy rights from the distinctly different point "discussed with counsel."

Finally, had the Court of Appeals been asked to apply the presumption of § 2254(d) to this newly asserted factual

State's. *Cf. Ford v. Wainwright*, 106 S.Ct. 2595, 2604-5 (1986). Moreover, in light of the statements that were of record regarding the parties' intent in the plea agreement and the record that was before the Arizona court, the issue of what Mr. Adamson intended necessarily "turn[ed] on credibility determinations that could not be accurately made by an appellate court on the basis of a paper record." *Cabana v. Bullock*, 106 S.Ct. 689, 698 n.5 (1986). To make final factual determinations in such hybrid proceedings can hardly satisfy the Court's consistent demand in capital cases "that fact finding procedures aspire to a heightened standard of reliability." *Ford v. Wainwright*, *supra*, 106 S.Ct. at 2603.

²⁷ In its brief on Mr. Adamson's first appeal, the state made its concession of this point even clearer, arguing that the colloquy "is not significant": "From the beginning, the state has argued that Adamson's obligation to testify at a retrial was either part of the plea agreement when it was written or it was not. Whatever happened at the formal sentencing a year and a half after the agreement was written could not change that." Resp. [State's] Br. at 15, *Adamson v. Hill*, (9th Cir. No. 80-5941).

"finding," it doubtless would have concluded that the now suggested finding was "not fairly supported by the record." 28 U.S.C. § 2254(d)(8). The record here contains only two items of direct evidence as to what John Adamson subjectively "understood" his legal obligations were in April, 1980: Mr. Feldhacker's letter of April 3, 1980, and Mr. Adamson's own statement at his death sentencing hearing. The letter said clearly "John Harvey Adamson believes that he has fully complied with, and completed, his plea agreement entered into with the State of Arizona." JA 201. It said that not once but twice. JA 203. Mr. Adamson said "to me [the sentencing] signaled finality, an end, a time when everybody was satisfied that I had told the truth, that I had done whatever I said in the plea agreement that I was going to do according to the terms of that agreement." JA 142; *see also id.* at 144-148.

The Arizona Supreme Court never saw Mr. Adamson to evaluate his credibility. The only way it could hold these statements were false would be to decide that the obligations were so clear that no one could possibly misunderstand them. But the only other persons who shared Mr. Adamson's perspective—his attorneys—also shared his belief that "[t]he plea agreement was drafted in such a manner that it was anticipated to be concluded prior to Mr. Adamson's sentencing." JA 203; *see* JA 52, 91.²⁸ They

²⁸ Indeed, the record suggests that even the prosecutors involved in the plea agreement were uncertain of the duration of its obligations after sentencing. *See* n.9, above. Mr. Feldhacker has sworn that Mr. Schafer told him after the sentencing that "he was not sure what he would do if the case against Max A. Dunlap and James A. Robison were reversed on appeal now that John had been sentenced." Exhibit 2 to Petitioner's Response to Motion to Dismiss, *Adamson v. Hill*, *supra*. Mr. Schafer's actions seem to reflect this uncertainty: for if there was never any question that Mr. Adamson's obligation to testify continued past his sentencing, why was it necessary to put on the record that possible future testimony in the Ashford Plumbing case had been "discussed with counsel"?

knew, as he did, that both events that the plea agreement had said would occur only "at the conclusion of [Mr. Adamson's] . . . testimony in all of the cases referred to in this agreement"—the imposition of sentence and Mr. Adamson's transfer to federal custody (JA 197, 199)—had occurred. Their legal research had told them Arizona law permitted jeopardy to be deferred only until the time of sentencing. JA 71.²⁹ They, too, believed that the colloquy at sentencing extended Mr. Adamson's obligations only with regard to the Ashford Plumbing case. JA 92-3.

That belief was not irrational. Seven federal Court of Appeals judges below found that "[l]ogic and common sense support Adamson's position that when the State moved for sentencing, it acknowledged that his obligation to provide further testimony ended." JA 191. If it establishes nothing else, the Court of Appeals' opinion here is itself evidence that the position Mr. Adamson and his attorneys took, if legally erroneous, was an error a reasonable person could make. A finding that no one could possibly have subjectively "underst[ood]" what Mr. Adamson and his lawyers say they did, could not be supported even with the § 2254(d) presumption.

III. THE COURT OF APPEALS CORRECTLY FOUND THAT JOHN ADAMSON DID NOTHING WHICH WARRANTED FORFEITURE OF THE PROTECTIONS OF THE DOUBLE JEOPARDY CLAUSE.

We believe this case is properly decided as the Court of Appeals majority decided it: by a straightforward

²⁹ Although the documents of record here do not directly refer to it, Mr. Adamson's lawyers may also have been aware of the long established Arizona rule "that the authority of the court to permit a withdrawal of a plea of guilty is limited to the *period prior to the pronouncement of sentence*" *State v. Barnes*, 414 P.2d 149, 150 (Ariz. 1966), quoting *State v. Telavera*, 261 P.2d 997, 999 (Ariz. 1953) (original emphasis). In any event, that rule obviously supported their belief that the sentencing signalled finality under the plea agreement.

application of established legal principles to its particular facts. The petitioner and the Solicitor General divert their arguments from the facts and the law, to "policies" which they say are undermined by the result in this case. Before answering their arguments, we will first examine in detail the Court of Appeals' reasoning; we will then turn to the "policies" ostensibly offended by its conclusion.

A. The Court of Appeals' Analysis.

In order to determine whether the State had met its burden of establishing that Mr. Adamson waived his double jeopardy rights, the Court of Appeals majority focused—as petitioner does not—on the particular actions by Mr. Adamson that could be alleged to have worked this forfeiture. The "waiver" has been variously asserted through the course of this litigation to have occurred at three different points: in the plea agreement itself; in Mr. Adamson's counsel's letter of April 3, 1980; and in Mr. Adamson's invocation of his fifth amendment rights before Judge Myers.

1. There can be no serious question that the Court of Appeals was correct in holding that the plea agreement itself did not waive the protections of the Double Jeopardy Clause. For one thing, although both the plea agreement and Judge Birdsall's questioning of Mr. Adamson about it were elaborate in their enumeration of the constitutional rights implicated, it is incontestable that throughout these documents and court proceedings "double jeopardy is not mentioned." JA 189, see JA 30-31, 199. It may or may not be that waiver of double jeopardy rights was implicit in what the plea agreement did say.³⁰ But as the

³⁰ A refusal to infer double jeopardy waiver where none is stated would certainly be consistent with this Court's decision in *Menna v. New York*, *supra*, and would not "render[] the plea agreement ineffectual and unenforceable from the inception," JA 217-218 (Brunetti,

Court of Appeals further recognized, even if an implied waiver of double jeopardy is assumed, "the most that could be found implied in the plea agreement is that if Adamson did, or refused to do, something in the future, his action or inaction would constitute a waiver of his double jeopardy rights." JA 189. All the references in the plea agreement delineating the circumstances in which it would become "null and void" are written in the subjunctive, and contingent on some future action by the defendant. See JA 195, 196, 198, 199. Nowhere did it contain anything resembling a self-executing double jeopardy waiver.

2. In the Court of Appeals, "[a]t oral argument, the State admitted that Adamson's attorney's letter listing the additional demands in exchange for his testimony was not a breach of the agreement. Rather, [the letter] . . . was Adamson's assertion of his interpretation of the agreement." JA 191. Despite petitioner's concession at this point, however, the Solicitor General argues here that "a defendant who asserts (as [Mr. Adamson] . . . did) a reading of his plea agreement that is no better than arguable 'takes the risk' of a double jeopardy waiver. Sol.Gen.Br. at 21.

Even if the contrary had not been conceded, nothing supports that position. Certainly the facts of this case do

J., dissenting). Arizona law permits trial judges to defer final acceptance of guilty pleas until the time of sentencing. See *Lombrano v. Superior Court*, 606 P.2d 15, 16 (Ariz. 1981). Mr. Adamson's lawyers' arguments suggest they understood the plea agreement and Judge Birdsall's action in continuing the case "subject-to-call" (JA 43) to invoke this principle. See JA 71. That meant no waiver of double jeopardy rights was necessary so long as it was understood that, as the Plea Agreement said, Mr. Adamson would "be sentenced at the conclusion of his testimony in all cases referred to in this agreement" (JA 197)—for jeopardy would not attach until the required testimony was provided.

not: nothing in the agreement remotely suggests that such an assertion through counsel would nullify the agreement or waive Mr. Adamson's double jeopardy rights. Nor is any legal authority suggested for the position. Even under the law of contracts, such an assertion—especially one made on advice of counsel, with substantial legal basis—does not itself suspend the obligation of the other party. *New York Life Insurance Co. v. Viglas*, 297 U.S. 672 (1936).³¹ Mr. Adamson never "disclaim[ed] the intention or duty to shape [his] conduct in accordance with the provisions of the contract. Far from repudiating those provisions, [he] appealed to their authority and endeavored to apply them." *Id.* at 297 U.S. at 676.³² Unless the presumption against a waiver of constitutional rights affords less protection than the common law of contracts, the Solicitor General's argument on this point cannot be supported.

3. The issue, then, as the Court of Appeals recognized, turns on Mr. Adamson's assertion of his fifth amendment rights before Judge Myers. But "Adamson's

³¹ See *Mobley v. New York Life Insurance Co.*, 295 U.S. 632, 638 (1935); *Walker v. Shasta Minerals and Chemical Co.*, 352 F.2d 634, 638 (10th Cir. 1965); *Kimel v. Missouri State Life Ins. Co.*, 71 F.2d 921, 923 (10th Cir. 1934).

³² It bears repeating here that, contrary to petitioner's representations to this Court, Mr. Adamson's never "stated his intent to prevent the superior court from construing the agreement . . ." Pet.Br. 20. Mr. Feldhacker's letter did not say that; it said "without some type of stipulation, a Superior Court judge will not have any jurisdiction to change, alter, or withdraw Mr. Adamson's plea agreement and/or sentence." JA 204 (emphasis added). Mr. Adamson, and his counsel, continually took the position that there should be a hearing to construe the agreement before Judge Birdsall, the judge who approved it. JA 52, 61, 70; see JA 144. It was the State that successfully resisted having Judge Birdsall construe the agreement before the Arizona Supreme Court ruled on Mr. Adamson's alleged breach. See JA 70-79, 97-98.

refusal to testify at the Dunlap and Robison pre-trial hearings was in direct response to the states' letter purporting to withdraw the protection of the plea agreement." *Adamson v. Ricketts*, *supra*, 789 F.2d at 729; JA 191. The record plainly supports this: Mr. Adamson's counsel informed Judge Myers of his understanding that Mr. Adamson was "now, pursuant to correspondence from the prosecution, subject to being prosecuted for the killing of Don Bolles on a first degree murder charge," JA 50; see JA 94. The prosecutors, in their arguments, never said anything to dispel that belief. Mr. Adamson thus answered that he was "taking the Fifth Amendment on advice of counsel," repeating twice that he was doing so "[u]nder the circumstances" JA 58-59. Judge Myers sustained his claim of privilege (JA 53, 58), implicitly upholding his claim that "the circumstances" gave him that legal right.

In no fair sense can that specific, limited claim of privilege be characterized as a waiver which is either "knowing," or "voluntary." Mr. Adamson had no way to "know" that he was forfeiting his constitutional rights, by doing what his counsel advised him to do and what the judge presiding held he could do. Even the prosecutor, in his arguments to Judge Myers, recognized that it was only by a judicial ruling that Mr. Adamson could "know whether or not he is in violation of the plea agreement and whether or not he is compelled to testify pursuant to the plea agreement at this hearing." JA 57.

Nor, in any legal sense, could Mr. Adamson be said to have thus abandoned his double jeopardy protection "voluntarily." The "circumstances" Mr. Adamson confronted involved more than just a "Hobson's choice" between his fifth amendment right to be free from self-incrimination and his protection under the Double Jeopardy Clause. He was faced with a direct assertion by the prosecuting authorities that they believed he was *already* in violation

and subject to reprosecution. Although the State has since abandoned that assertion, it made it then; and Mr. Adamson's lawyers advised him, and Judge Myers held, that he was within his legal rights to invoke his self-incrimination privilege "under the circumstances" then prevailing. To later hold his claim of privilege was unjustified and constituted a violation of the agreement and a waiver of double jeopardy rights, would be "to sanction the most indefensible sort of entrapment by the State—[penalizing] . . . a citizen for exercising a privilege which the State clearly had told him was available to him." *Raley v. Ohio*, 360 U.S. 423, 438 (1959).³³ The Court of Appeals correctly held that Mr. Adamson, "faced with the state's letter asserting that he was no longer protected from prosecution, could hardly be expected to forgo the constitutional protection against self-incrimination, especially when the Arizona Supreme Court refused to reverse Judge Myers' decision." JA 192.

4. Of course, as the Court of Appeals also recognized, this might be a different case if Mr. Adamson had not offered to testify under the plea agreement, immediately after the Arizona Court's decision. JA 190, 193. Once that

³³ The situation in *Raley* was closely analogous to that here. There, the defendants claimed the Fifth Amendment privilege before a legislative commission after being advised by the commission chairman that the privilege could properly be invoked. 360 U.S. at 426-427. They were charged with and convicted of contempt for their refusals to answer. 360 U.S. at 424. On appeal from their conviction, the Supreme Court of Ohio "held that the appellants were presumed to know the law of Ohio—[and] that an Ohio immunity statute deprived them of the protection of the privilege—that they therefore committed an offense by not answering the questions as to which they asserted the privilege." 360 U.S. at 425. This Court unanimously held that it violated due process to criminally penalize that claim of privilege, due to the "lack of knowledge by the appellants, because of the commission's action, that they were being considered as unlawfully refusing to answer the questions." 360 U.S. at 437 n.12.

decision clarified his obligation, a refusal to testify would have been a "knowing" and "intentional" act, triggering any implied waiver of double jeopardy rights the plea agreement was read to contain. But Mr. Adamson did offer to testify under the plea agreement³⁴—on the first business day after the Arizona Court's decision, and before the *Dunlap* and *Robison* prosecutions were scheduled to begin. JA 148. It was the State that then repudiated the plea agreement, responding that it would "consider" having Mr. Adamson testify, only if he would accept a life sentence. Pet.Br. 23; see JA 148.³⁵

Mr. Adamson's offer to testify before the *Dunlap* and *Robison* retrials began made his previous temporary refusal to testify immaterial. Surely, to justify the forfeiture of a constitutional protection, a breach of a plea agreement must be substantial and material.³⁶ Even in a

³⁴ We are mystified by the petitioner's characterization of the Court of Appeals' finding on this point as a "glaring misstatement," at the same time petitioner admits it is true. Pet.Br. 23. Mr. Adamson's offer to testify "if he could retain the same sentence he had received under the plea agreement" (*ibid.*) was, perforce, an offer to comply with his "obligat[ion] under the plea agreement to testify" JA 190. Nothing in the plea agreement or the Arizona Supreme Court's construction of it, supports the State's assertion that it could condition its willingness to go forward with the agreement on Mr. Adamson's acceptance of a substantially more severe sentence. And in fact, even when Mr. Adamson offered to accept such a sentence before the trial, the State again turned him down. JA 149-150.

³⁵ The fact that the State was willing to "consider" this offer belies its later-concocted assertion that Mr. Adamson's credibility was somehow undermined by his unsuccessful request for further consideration. As the Court of Appeals noted, if that really was the State's motivation—which it never claimed at the time—it was a wholly irrational one. JA 193.

³⁶ Examining due process claims similar to that reserved by the Court of Appeals here, several courts have so held, even apart from double jeopardy considerations. See e.g., *United States v. Simmons*, 537 F.2d 1260, 1261 (4th Cir. 1976); *Gamble v. State*, 604 P.2d 335, 337 (Nev. 1979); *State v. Rivest*, 316 N.W. 2d 395, 399 (Wisc. 1982).

purely commercial context, where a "breach is not material, the aggrieved party may sue for 'partial breach' but may not cancel the contract." CALAMARI & PERILLO, *THE LAW OF CONTRACTS* 408 (2nd Ed. 1977). See *Restatement (Second) of Contracts*, § 236, comment b; *id.* at § 237, comments b and d.

If the opposite party has performed substantially, the obligor is not released; he must fulfill his commitments and look to a damage remedy . . . he has crossed the threshold; the opposite party's substantial performance keeps him across the threshold; the less than substantial default does not put the obligor back across the threshold into the domain of no commitment.

FRIED, *CONTRACT AS PROMISE* 122 (1981). Even under the harshest contract theories, an immaterial breach in the performance of a unilateral obligation is excused if a disproportionate forfeiture would otherwise result. *Restatement (Second) of Contracts*, § 229.³⁷ To hold John Adamson liable to forfeit his rights, and his life, when he had performed all but one of the obligations under the plea agreement, and stood ready to perform that one in time for the State to reap the full benefit of his performance, would diminish the constitutional demand for fairness in capital trials to a stature lower than the settled rules for fair dealing in the commercial marketplace. The Court of Appeals rightly refused to do that.

B. *The "Policies" of the Double Jeopardy Clause.*

The Solicitor General's brief concludes with an argument that attempts to sail beyond the facts of this case, to argue that some general "policy of the Double Jeopardy

³⁷ See also e.g., *Sahadi v. Continental Illinois National Bank*, 706 F.2d 193, 196, 199 (7th Cir. 1983); *Burger King Corp. v. Family Dining Inc.*, 426 F.Supp. 485, 494-495 (E.D. Penn. 1977), *aff'd*, 566 F.2d 1168 (3rd Cir. 1978).

Clause" is offended by the Court of Appeals' decision here. Its argument on this score consists mostly of hyperbolic warnings of the implications for plea bargaining of the Court of Appeals' decision. They have little basis in reality, and no relation to the true policies that the Double Jeopardy Clause of the fifth amendment was intended to enshrine. In fact, the core policies of the Double Jeopardy Clause are exactly what compel the result the Court of Appeals reached here.

The Double Jeopardy Clause "was designed originally to embody the protection of the common law pleas of former jeopardy. . . ." *Brown v. Ohio*, *supra*, 432 U.S. at 165. One of those pleas is "autrefois convict." See *United States v. Scott*, *supra*, 437 U.S. at 96. That defense—not just some peripheral and secondary double jeopardy protection—is what is at issue here. That defense effectuates "the primary purpose of the Double Jeopardy Clause . . . to protect the integrity of a final judgment, see *Crist v. Bretz*, [437 U.S. 28, 33 (1978)]," *United States v. Scott*, *supra*, 437 U.S. at 92. It was precisely this "constitutional policy of finality for the defendant's benefit," *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality option), Mr. Adamson and his lawyers relied on, and the Court of Appeals enforced.³⁸

³⁸ Judge Brunetti's dissenting opinion appears to interpret Judge Birdsall's statement that Mr. Adamson would be sentenced "strictly in accordance with the provisions contained in the plea agreement" (JA 224) to make the sentence eternally tentative. This would wholly undermine the double jeopardy finality principle. In context, these comments by Judge Birdsall were obviously directed at the limitations on the severity of sentence he had accepted. See JA 43, 47. We do not believe they carry the implication Judge Brunetti would derive from them; to hold that they did would create a new species of criminal sentence, a sentence asterisked with conditions and never truly final.

Contrary to the Solicitor General's position, a secondary purpose of the Double Jeopardy Clause—to prohibit "governmental oppression," *United States v. Scott*, *supra*, 437 U.S. at 91, and "[h]arrassment of an accused by successive prosecutions," *Downum v. United States*, 372 U.S. 734, 736 (1963)—is also very much involved here. This case may not present "the possibility that even though innocent [the defendant] . . . may be found guilty," *Green v. United States*, *supra*, 355 U.S. at 187-188; that concern is generally irrelevant in guilty plea cases. But it no less involves a danger of "prosecutorial . . . overreaching." *United States v. Dinitz*, *supra*, 424 U.S. at 607.

A better demonstration of that danger could hardly be imagined than the Solicitor General's position on the balance of power between a defendant and the prosecution under a plea agreement. Under the regime it proposes, a cooperating defendant—whatever his understanding of his obligations, and whatever the extent of his performance—would never have more than the "choice between acquiescing in the government's request and asserting a debatable interpretation of the plea agreement," Sol.Gen.Br. at 22—and would risk losing his double jeopardy rights and all of the benefits of his bargain if his interpretation turns out to be wrong. The government, on the other hand, would not only have the power to intimidate a defendant into accepting its demands; it would also be free arbitrarily to choose, or to refuse, to renew the agreement once the defendant's position—and his constitutional protection—is vanquished. See Sol.Gen.Br. 21 n.11. Although this is a context different from that in which the Court has spoken before, if the Double Jeopardy Clause stands as a general barrier against "the prosecutor . . . using the superior resources of the state to harass or achieve a tactical advantage over the accused" by the threat of repeated trials, *Arizona v. Washington*, 434 U.S. 497, 508 (1978), it should stand against this.

A final policy of the Double Jeopardy Clause—to prevent the State from “subjecting [the defendant] . . . to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity,” *Green v. United States*, *supra*, 355 U.S. at 187—is similarly implicated by this case. The “embarrassment, expense, and ordeal” to which John Adamson was put did not, admittedly, arise out of repeated criminal trials in which he was the defendant, but he experienced them nonetheless. Mr. Adamson’s first trial ended only after he admitted guilt of murder in open court, waived his constitutional trial rights, and entered into extensive obligations for future testimony on behalf of the State. He escaped a death sentence through a process similar in many respects to an Arizona capital trial: the trial judge reviewed the factual record and a pre-sentence report, as well as the plea agreement and Mr. Adamson’s admissions, before determining that the recommended prison sentence under the plea bargain was “appropriate.” JA 38-43; compare *Arizona v. Rumsey*, *supra*, 467 U.S. at 205-206. Then, for two years, Mr. Adamson underwent an “ordeal” more protracted than most criminal defendants experience in their own trials: seemingly endless examination and cross examination in the cases in which he had promised to testify, accompanied by threats to his life from those he testified against and the threat of reprosecution and a death sentence from the State if he was ever found untruthful.³⁹ It was his understanding

³⁹ At his final sentencing, Mr. Adamson recounted the history of his testimony as follows:

I have now made 14 court appearances to date on five separate cases consisting of approximately 31 days of testimony. These cases have been heard by eight different Judges, three of them Federal Judges and one Federal Magistrate. Of the 81 or so jurors who have heard my testimony all have returned guilty verdicts in each case resulting in seven convictions.

I have been cross-examined under oath for approximately 190

that the ordeal ended when he was sentenced—with the single, possible exception that the State of Arizona might still initiate prosecution of the Ashford Plumbing case. The Court of Appeals’ opinion here properly understood that the policies behind the Double Jeopardy Clause were designed to provide a criminal defendant just such a final refuge from governmental exactions of payment for his crime, a refuge that does not vanish simply because he tries to assert it.

In no fair sense can it be said that Mr. Adamson attempted here “to use the Double Jeopardy Clause as a sword . . .” Sol. Gen. Br. at 25, *quoting Ohio v. Johnson*, 467 U.S. 493, 592 (1984). Mr. Adamson did not attempt “to prevent the state from completing its prosecution on the . . . charges” against him. *Ibid.* He simply asserted that prosecution *was* complete, as both the plea agreement and the Double Jeopardy Clause seemed to say it should be, when he was sentenced. In the most literal sense, he invoked the Double Jeopardy Clause as the shield it was intended to be: a protection against the State’s use of the

hours by some of the most brilliant legal minds in the country and some of the most skilled in the art of cross-examining. In all I have been examined and cross-examined and reexamined by 22 different attorneys, ten defense attorneys of the likes of Percy Foreman, John Flynn, Paul Smith, seven state and local prosecutors, five federal prosecutors.

Totally 21 investigators have also examined, reexamined, and cross-examined me, five Alcohol and Tobacco Firearms Agents, two Drug Enforcement Administration Agents, five Federal Bureau of Investigations Agents, five Phoenix Police Department Organized Crime and Intelligence Agents—or detectives, excuse me, two City of Phoenix bomb experts, and two homicide detectives from a midwest location.

In total, Your Honor, I have cooperated in approximately 205 interrogative sessions which have been conducted to date. Fifty-five of these have been formal face-to-face in-depth question and answer sessions, approximately.

constant threat of reprosecution to compel his unending obedience to its every demand.

Nothing about the Court of Appeals' recognition that the Double Jeopardy Clause does provide this protection reduces the utility of plea agreements to secure accomplice testimony for the government, let alone "renders plea agreements . . . almost entirely unenforceable by the government" Sol.Gen.Br. 24. All the government needs to do to make sure its agreements are enforceable is what most prosecutors already do in these situations: arrange for the defendant's sentencing to follow his or her testimony.⁴⁰ If that is for some reason impractical, all that is required is a simple expedient, which, we certainly believe, is not "beyond the capability of most attorneys" (Sol.Gen.Br. at 25), who have any experience in criminal prosecution: "[t]he agreement could . . . address[] the waiver issue, specifically." JA 192.

⁴⁰ The prevalence of this practice is evident from even a cursory survey of the federal cases which discuss such plea agreements in different contexts. See e.g., *United States v. Verrusio*, 803 F.2d 885 (7th Cir. 1986); *Brown v. Wainwright*, 785 F.2d 1457 (11th Cir. 1986); *United States v. Waterman*, 732 F.2d 1527 (8th Cir. 1984); *Ross v. Hopper*, 716 F.2d 1528 (11th Cir. 1983); *Smith v. Kemp*, 715 F.2d 1459 (11th Cir. 1983); *Williams v. Brown*, 609 F.2d 216 (5th Cir. 1980); *United States v. Barnham*, 595 F.2d 231 (5th Cir. 1979); *Campbell v. Reed*, 594 F.2d 4 (4th Cir. 1979); *United States v. Davis*, 582 F.2d 947 (5th Cir. 1979); *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976); *Blankenship v. Estelle*, 545 F.2d 510 (5th Cir. 1977); *United States v. Figurski*, 545 F.2d 389 (4th Cir. 1976); *United States v. Simmons*, 537 F.2d 1260 (4th Cir. 1976); *United States v. Solimine*, 536 F.2d 703 (6th Cir. 1976); *United States v. Acosta*, 526 F.2d 670 (5th Cir. 1976); *United States v. Lemonakis*, 485 F.2d 941 (D.C. Cir. 1973); *United States v. Fontenot*, 483 F.2d 315 (5th Cir. 1973); *United States v. Tashman*, 478 F.2d 129 (5th Cir. 1973); *United States v. Madonna*, 556 F.Supp. 260 (S.D.N.Y. 1982); *Blanton v. Blackburn*, 494 F.Supp. 895 (M.D. Alabama 1980), *aff'd* 654 F.2d 719 (5th Cir. 1981); *Kirchellis v. Long*, 425 F.Supp. 505 (S.D. Ala. 1976).

The agreement here clearly addressed the waiver of the other constitutional rights it implicated. JA 199. Similar waivers have been written into even routine guilty pleas since *Boykin v. Alabama*, *supra*. Since Mr. Adamson's case, such explicit waivers of double jeopardy rights have been reported in Arizona plea agreements as well. See e.g., *Dominiquez v. Mehan*, 681 P.2d 912, 914 (Ariz. 1983).

Such specificity would not undermine, but enhance, "predictability and reliance" Sol.Gen.Br. at 24. It would create no threat that the defendant will get "more than 'the benefit of his bargain'" (*ibid.*); it simply would ensure that the defendant will know, exactly, what his "bargain" entails, and when his jeopardy will end. The Court of Appeals did not err by holding John Adamson was entitled to know that.

To the extent that concerns about the government's ability to obtain witnesses' cooperation through plea bargaining are relevant here, they strongly favor the Court of Appeals' position. If this Court holds that years of truthful cooperation with the government, and a sentence solemnly pronounced and partly served, can be swept away, to count for nothing, by a single hesitation, it will make plea agreements for testimony Faustian pacts, indeed. If the State of Arizona is permitted to put John Adamson to death, because he balked once—after he has surrendered his right to trial, testified for the prosecution over and over, and made clear his willingness to do so again—it will be a rare defense lawyer who will advise a client to follow his example and cooperate with the government in a major criminal prosecution.

We cannot believe the Court will find any "policy" favoring plea agreements for cooperation will be fostered by sanctioning such an imbalance of power between the State and its defendant-witnesses. Rather, as the Court has

recognized before, the environment in which the government seeks cooperation must include "safeguards to ensure the defendant what is reasonably due in the circumstances." *Santobello v. New York*, *supra*, 404 U.S. at 262. The Double Jeopardy Clause is one of those safeguards. No rational or fair "policy" in the administration of criminal justice would be furthered by holding its protections were suspended here.

CONCLUSION

The Court of Appeal's decision should be affirmed.

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